COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

Andres Sebastian Ferrer

Appellant.

No. 47687-8-II

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Andres Sebastian Ferrer, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

A summary of additional grounds is attached to this statement.

Date: 9/29/2015 Signature:

I. ASSIGNMENTS OF ERROR

1. The trial judge abused his discretion in admitting photographic evidence that was both cumulative and inaccurate.

2. The trial judge abused his discretion in imposing a ten year No Contact Order with the victim, and in ordering mental health treatment.

3. The jury received insufficient instruction on the definition of "substantial bodily harm", which led to a statutory misinterpretation of Assault 2.

4 The jury received insufficient instruction, and the trial judge abused his discretion in not providing such instruction, regarding the requirements for a conviction of Harassment.

II ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Where photographs of the victim's injury are the sole material evidence used for a conviction of Assault 2 under the substantial bodily harm prong, and they are both excessive in number and of poor quality, is the error not harmless? (Assignment of Error 1)

2. When the length of sentence is found to be calculated in error and/or excessive, must a No Contact Order imposed that depends upon the maximum statutory sentence also be reduced or vacated? (Assignment of Error 2)

3. When a conviction of Assault 2 depends upon a finding of substantial bodily harm, does a reliance on the jury's interpretation of the word "substantial" lead to statutory misinterpretation? (Assignment of Error 3)

4. When a conviction of Assault 2 depends upon a finding of substantial bodily harm, does the omission from jury instructions of the full definition of the crime lead to statutory misinterpretation? (Assignment of Error 3)

5. When jury instructions on the requirements for a conviction of Harassment omit the Petrich argument, is the error not harmless? (Assignment of Error 4)

III. ARGUMENT AND AUTHORITY

1. The trial judge abused his discretion in admitting photographic evidence that was both cumulative and inaccurate.

I argue that the trial judge abused his discretion in admitting photographs that were 1) cumulative and 2) inaccurate. This error was not harmless because there was a substantial likelihood that the outcome (my conviction for Assault 2) would have been different without these errors. (Please refer to 20 photos in the first and second Supplemental Designations of Clerk's Papers, of the 31 photos that were shown at trial.)

Regarding the cumulative nature of the evidence admitted, the prosecution submitted 45 photos of Kristina's injuries taken over the course of 8 days. Although there was significant discussion of their inclusion in the trial (beginning on page 110, Vol. I), 25 of these were in fact admitted and viewed by the jury. These 25 photos of injuries were passed to each member of the jury for them to view during trial, and this large stack of photos was then available again on the table during jury deliberations for a significant additional amount of time. These were all photographs of the same injuries to a limited portion of Kristina's body, from slightly different angles, series' of which were taken

sometimes only one day apart. I therefore argue that the amount of cumulative time the jury spent viewing this redundant, excessive, and prejudicial evidence heavily influenced their decision to convict me for Assault 2.

It is also evident that this volume of photographic evidence being admitted was far out of the normal protocol for this type of case, and that the judge and both attorneys knew this. On page 110 of Volume I, defense counsel Brian Walker states that traditionally in these types of cases with bruising, one or two photos are submitted by the State. On page 153, the judge also questions why defense has submitted so many pictures of bruising. Additionally, on page 155, the following exchange takes place with prosecution, showing that the judge agreed that including so many photos was cumulative and potentially prejudicial. *"LS [Laurel Smith]: Okay. I'm still asking the court to admit one from each day so that I can give my time line of what this looks like. Judge: I don't think you need to. I believe it's cumulative as to all of them....I agree with Mr. Walker. If you keep showing all these photographs the – the burden is to show that it was a significant, substantial injury. You're able to do that by the first couple of photographs – the first for two days and the end day....[right now] we have about ten photographs of the same thing."*

Beginning on page 248 of Volume II, defense counsel again asks the judge to reconsider the admission of so many photographs, and the judge declines to deal with the issue Repeatedly throughout the testimony of the prosecution's witnesses, the judge again says

that he is going to address the issue of the admission of individual photographs, and each is admitted in turn. Despite having recognized that only "a couple" of photos would be sufficient, eventually 7 injury photos are admitted from the day of the incident (March 22), 4 from 8 days later (March 30), 10 from the days in between, and an additional 4 that are undated, for a total for 25 (see Exhibit List). Based on this recognition of normal protocol by Judge Gonzales and his refusal to abide by it, I argue that not only was the evidence admitted cumulative and prejudicial, but that the judge abused his discretion in admitting 25 photographs of Kristina's injuries when he knew that "a couple" would be sufficient to meet the burden of proof.

I also object to the admission of evidence that was of such poor quality that it significantly distorted the nature of the injuries in question. As you can see on the Exhibit List, photographs admitted were taken on at least 5 different occasions by different individuals, presumably with different digital devices producing widely a varying quality of images. They were then altered again in the process of printing them for the jury. The varying and poor quality of the photographs therefore significantly impacted their decision to convict me on Assault 2.

On page 120 of Volume I, Mr. Walker objects to the inclusion of photographs taken by Officer Alba on March 22 where color distortion is evident because the colors of household appliances and walls in the background are different than their actual colors. Despite this objection, one page 125, Judge Gonzales says he is "not worried about the

tinting," and 7 photographs from this batch are admitted and viewed by the jury. On page 147, the judge and two attorneys again discuss problems with color distortion in photographs 33 through 44 (first Supplemental Designation Exhibits 40, 42, 43, 44, and second Supplemental Designation Exhibit 35). On page 148, the judge refers to the quality of the photographs as "horrible", and on page 150 he agrees with the defense counsel that they are "inaccurate" and "make the bruises look darker". Despite this recognition, 5 photographs from this batch are admitted anyway. Again, based on this recognition by Judge Gonzales that at least some of the photographs were of very poor quality and his refusal to remove them, I argue that the evidence admitted was of such poor quality that it significantly distorted the nature of the injuries, therefore significantly impacted the jury's decision, and that the judge abused his discretion in admitting them. On these grounds, I ask that you vacate or remand my Assault 2 conviction.

2. The trial judge abused his discretion in imposing a ten year No Contact Order with the victim, and also in ordering mental health treatment.

I would like to add several additional points to the assignments of error in my sentencing argued by Mr. Muenster in the Appellant's Opening Brief. I believe that the ten year No Contact Order with Kristina, as well as the order for mental health treatment are, like the sentence, excessive and/or abuses of the judge's discretion.

On page 867 (Volume V) of the transcript, Attorney Smith argues and Judge Gonzales agrees that a ten year No Contact Order with Kristina should be imposed, which equals

the maximum statutory sentence for the two felonies. However, the ten year maximum was calculated based upon, as Mr. Muenster argues in my opening brief, the erroneous offender score of two, as well as separate criminal conduct for the two crimes. I therefore argue that the ten year No Contact Order must also be vacated along with the exceptional sentence, or at least reduced according to the new maximum sentence.

In the same discussion referred to above, the judge states that Mr. Walker indicated that the Parenting Plan will be subject to family court, and that that's where my contact with my children will be decided. While this is indeed true, I have already been prevented from seeing my children until the completion of this appeal, which added to the time I was prevented from seeing them pending trial, now equals 1.5 years with no end in sight The argument that a family court commissioner made in extending my No Contact Order with my own children two days after my sentencing was that I should not be permitted to resume a relationship with them before I will supposedly go off again to serve my sentence. Finding this argument unacceptable, I am currently in the process of working with a new family attorney to reverse this decision and be able see my children.

I am a father who loves my young children deeply and misses them terribly, and who was convicted of one crime lasting three minutes during which they were sleeping. In this context where there is no prior history of domestic violence, and never any against my children, I urge you to consider that the ten year No Contact Order with the mother of my children in this criminal case puts extraordinary limitations on my ability to reestablish a

meaningful relationship with them through family court. I have no desire whatsoever to have contact with Kristina for any purpose other than discussing our children. However, I am keenly aware that a Parenting Plan where the parents are not permitted to have contact with each other necessarily prohibits me from participating in making any decisions at all on their behalf until they are 13 and 14 years of age—making this No Contact Order clearly excessive, even if my felonies are not vacated.

By the time you have decided this appeal, Kristina will not have had to have contact with me for about three years already, even if I am successful in seeing my children before then. If the terms of Community Custody are imposed (page 4 of the attached Felony Judgment and Sentence), she would not have contact with me for an additional 1.5 years, for a potential total of 4.5 years. Please consider that that is an exceptionally long time to recover from one night's altercation, and also that this Order has significant implications on my ability to meaningfully interact with my children for the bulk of their childhood no matter what a family court decides, and vacate or significantly reduce the No Contact Order that accompanies my sentence.

Additionally, the judge's order for mental health treatment (p. 867, Volume V; and p. 5 of Felony Judgment and Sentence) is completely unwarranted in my case. The state of my mental health was never brought up in trial, and I have no history at all with mental health issues. I urge you to vacate this portion of the sentence as excessive and/or an abuse of the judge's discretion. I do not contest the order for a domestic violence

evaluation, as I believe it will clearly show that I am not an individual with a repeated pattern of domestic abuse, and therefore that I do not require treatment for domestic violence. I am certain this will further support my claim of erroneous conviction of both felonies, as well as assist my case to regain meaningful custody of my children in family court.

3. The jury received insufficient instruction on the definition of "substantial bodily harm", which led to a statutory misinterpretation of Assault 2

I argue that an insufficient jury instruction on the definition of Assault 2 led to a statutory misinterpretation, and therefore to my conviction of this crime. In jury instructions 6 through 13 (included at the beginning of Vol V transcript), many of the terms in the definition of the offense are clarified, including *assault, intentional, reckless, lawful force, strangulation, substantial bodily harm, and disfigurement.* Since the jury was not unanimous on the strangulation prong of this offense, my conviction rested solely on their finding of substantial bodily harm. While the definition of substantial bodily harm is given in jury instruction 9 as "temporary but substantial disfigurement", and the definition of disfigurement is then given in jury instruction 10, I believe the omission of a definition of the word *substantial* caused the jury to convict me on Assault 2 instead of Assault 4, which they were alternatively asked to consider.

As Mr. Walker stated repeatedly during trial, sentencing, and deliberations with the judge and prosecution, he believed from the start that this was an Assault 4 case. However,

under the instructions given to the jury, the heavy weight on the definition of disfigurement as "that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, imperfect, or deformed in some manner" in their finding of substantial bodily harm sets the bar incredibly low for injury inflicted. With only these terms defined, the jury could have considered *any* superficial mark left of any kind as evidence of a felony—which, given the significant penalties and long lasting social implications of felony convictions, I do not believe the legislature in any way intended.

Further proving my point is the fact that jury instruction 9 for substantial bodily harm leaves out the third type of injury, "a fracture of any bodily part" (RCW 9A.04.110 (b)). I believe the jury needed the full definition to consider the legislature's intention of the scope actions that make this crime serious enough to be a felony, a definition which includes not only the loss of organ function, but the fracturing of bones, alongside disfigurement. If they would have been able to consider whether the temporary and superficial bruising present in this case belonged at all in this category of crimes along with temporarily blinding someone or breaking their arm, they would have been much less likely to convict me of Assault 2. (I believe this would have especially been true if, as I also argue, they had only viewed a few high quality photographs of this bruising that accurately depicted it.) Furthermore, the full list of actions and injuries listed under Assault 2 (RCW 9A 36.021)-- including poisoning, torture, and intentionally injuring an unborn child—are many degrees more heinous than superficial bruising, and if the jury

had had knowledge of these other categories, they certainly would not have convicted me on this count.

In February 2013, the Washington State Supreme Court Committee on Jury Instructions also admitted in a brief that there is confusion on the definition of substantial bodily harm, and that "It is not clear how far courts will go in applying the definition of 'substantial bodily harm'" (https://govt.westlaw.com/wcrji). For all these reasons: 1) the jury did not receive a definition of the scale of injury considered "substantial", 2) lacking this clarification, the definition of disfigurement provided to the jury inappropriately skews the level of injury necessary to convict, 3) aside from strangulation, the jury lacked other examples of injuries and actions included in an Assault 2 charge, and this further led them to misunderstand the legislature's intention, and 4) there is confusion in other Washington courts over the term substantial bodily harm, I ask you to find insufficient jury instruction and/or statutory misinterpretation on my Assault 2 conviction and vacate or remand it.

4. The jury received insufficient instruction, and the trial judge abused his discretion in not providing such instruction, regarding the requirements for a conviction of Harassment.

I argue that the jury received insufficient instructions and/or Judge Gonzales abused his discretion by not providing additional instruction to the jury that they had to agree unanimously on one instance of harassment, or that they had to agree that all of them

took place, and that this omission significantly impacted my conviction of felony Harassment.

On page 572 of Vol III, a lengthy discussion takes place about the application of Petrich *(Petrich vs. State of Washington, 1984)* to me allegedly making repeated death threats against Kristina. Though Mr. Walker requests additional jury instruction to clarify the standard of conviction for harassment based on Petrich, the judge refuses. Analysis of the Washington Supreme Court's decision on Petrich states that

> [4] Criminal Law - Evidence - Multiple Illegal Acts - Election - Absence - Prejudice. The failure to require the State to rely on a single illegal act for conviction or to require the jury to agree on a single act to find guilt is not harmless unless all illegal acts upon which evidence has been presented could be found by a rational trier of fact to have been proved beyond a reasonable doubt (http://courts.mrsc.org/mc/courts/zsupreme/101wn2d/101wn2d0566.htm)

Kristina alleged in her testimony on pages 296, 299, 303, 305 and 307 of Volume II that I threatened to kill her, and Mr. Walker correctly argues on page 573 of Volume III that each alleged statement is different in nature. Since the jury was never instructed according to Petrich that they all needed to agree that one incident took place and met the threshold for felony Harassment, or that they needed to be unanimous that all of the alleged incidents did, I submit that they were insufficiently instructed on, and therefore

erroneously convicted me of, Harassment, and ask that you vacate or remand the conviction.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Statement of Additional Grounds with Judgement and Sentence, upon the following attorney of record at the addresses shown, by depositing the same in the mail of the United State Postal Service at Vancouver, Washington, on the 30th day of September, 2015 with postage prepaid, or hand delivery (Mr. Muenster's copy).

Dated this 30th day of September, 2015

Andres S. Ferrer

David Ponzoha, Clerk
Court Of Appeals
950 Broadway
Suite 300
Tacoma, WA 98402-4454

Mark W. Muenster
1010 Esther Street
Vancouver, WA 98660

Laurel Smith
Deputy Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666